

DONOR 4

DATE 3/26/09

BB 407

EAST BENCH IRRIGATION DISTRICT



CLARK CANYON RESERVOIR

1100 HWY 41

DILLON, MONTANA 59725

(406) 683-2307

FAX (406) 683-0055

December 21, 2004

Jack Stoltz, Division Administrator
Montana Water Resources Regional Office
48 North Last Chance Gulch
P O Box 201601
Helena, MT 59620-1601

Dear Mr. Stoltz

Thank you for allowing the DNRC folks to attend the meeting in Three Forks to discuss some concerns of the Clark Canyon Water Supply, East Bench Irrigation District and the Bureau of Reclamation. It was a very productive and informative meeting. Out of that meeting, we came away with some questions we are hoping you can resolve.

As you know, Clark Canyon Reservoir was built back in the late 1950's and early 1960's for the multipurpose of irrigation, municipal, industry, fish, wildlife and recreation. Clark Canyon Reservoir provides irrigation for approximately 50,000 acres. Two entities were formed for administration purposes under the East Bench Unit. They are Clark Canyon Water Supply Company (CCWSC), which comprise the valley lands, and the East Bench Irrigation District (EBID), which comprise of the bench lands. Those in the valley that sign up for the project and receive supplemental water are called signers. There were some, because early priority water rights provide an adequate supply, did not sign up with the project and receive no supplemental water from the Reservoir. We refer to those as non-signers. We deliver water to all three entities, CCWSC, EBID and the non-signers. As you know, we are now starting our sixth year of a very severe drought. Storage and inflows into Clark Canyon Reservoir have been at record lows now for the last couple of years. East Bench Irrigation District received no water last irrigation season (2004).

When the project was first being considered, the practice of irrigation was all based on flood irrigation. As you are aware, those practices have changed over the last 40 years since the project went in. The Bureau of Reclamation (BOR) conducted an in-depth study of the Beaverhead River from 1910 to 1960. The study included historic river flows, water rights, water use and requirements, and historic accretions in various stretches of the Beaverhead River. The "signers" agreed to limit their use to 4 acre feet per acre at the diversion and to permit storage and regulation of river flows in excess of

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the 4 acre-feet per net acre irrigated. They did not give up their water rights. Each May, April this last irrigation season, a River Commissioner is put on the Beaverhead River for the recording of the CCWSC water usage and the regulating of the non-signers. The East Bench Unit Office is charged with releasing as per requested by the River Commissioner. We are charged with determining if the non-signers have the necessary inflows and accretions for delivering them their water. This is where our first question comes in.

The first question is: Will our method for determining delivery of water to non-signers of the Beaverhead River stand up if challenged this coming irrigation season in 2005? I am enclosing a summation of water rights, the method for determining the delivery of water to the non-signers, and how we figure if they receive water. We have four different gaging stations on the Beaverhead River, at the Reservoir, Barretts, Dillon and the Point of Rocks. These stations are serviced by the USGS on a regular basis and more often if we feel moss build up is becoming a problem.

Enclosed is our chart for determining delivery to non-signers, the summation of water rights according to priority date, an example of the daily readings from the hydromet and the River Commissioners water record sheets. We have also enclosed a sample worksheet to help with the explanation below.

On Mondays, after the River Commissioner has recorded the deliveries to the diversions, we take a five day average of the Clark Canyon Reservoir's inflows from the hydromet. By using the delivery records and the station readings from the hydromet, we can determine the accretions at Barretts Station, Dillon Station and the Point of Rock Station. We then follow the delivery formula, which we have enclosed. We report to the River Commissioner our findings of which non-signers can receive water. Attached are the work sheets.

If you have any questions, please feel free to call us at (406) 683-2307, fax (406) 683-0065. Some feel the above process is not legal due to the fact the valley has changed their irrigation practices, there by depleting the accretions and inflows. They feel that the inflows and accretions can not be predicted if the dam was taken out of the picture. The CCWSC Board of Directors would like to meet with the District Judge by March 15, 2005 with the technical and legal findings from your reply to this letter.

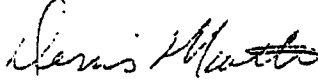
Question two deals with expanded acres. Because of irrigation practices, changes from flood to sprinkler to pivot, the same amount of water from the beginning of Clark Canyon Reservoir in 1965 is now being spread to approximately 35% (non-signers included) more acres of land. As explained by your staff, if, before salvage water came into the picture (I believe 1991), a person would have had to apply for a change of use permit to irrigate the expansion of acres due to the change of irrigation that person was using. Under what authority does the DNRC have over surface water in a federally contracted basin where the water rights have already been decreed and any excess is stored by the Bureau of Reclamation authorized in the water-user agreement when they signed up for

the project. East Bench Irrigation District feels this is one cause as to why they received no water last summer.

The last concern of the East Bench Unit is the adjudication process and where the Beaverhead River is on the priority list of basins to be reviewed. Given the nature of the drought and all the concerns of all the parties on water distribution, expanded acres, the issuance of new permits, surface or ground water, and contract renewal, CCWSC and EBID would urge you to step up the priority of adjudicating the Beaverhead basin. .

Thank you in advance for your time and legal expertise in answering our questions. We look forward to hearing from you.

Sincerely



Dennis Miotke
Project Manager

DM:sjd

Enclosures

Cc: Lenny Duberstein, BOR
Rich Moy, DNRC

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATIONBRIAN SCHWEITZER
GOVERNORDIRECTOR'S OFFICE (406) 444-2074
TELEFAX NUMBER (406) 444-2554

STATE OF MONTANA

WATER RESOURCES DIVISION (406) 444-6601
TELEFAX NUMBERS (406) 444-0533 / (406) 444-5918
<http://www.dnrc.mt.gov>1424 9TH AVENUE
PO BOX 201601
HELENA, MONTANA 59620-1601

February 8, 2005

Mr. Dennis Miotke
Project Manager
East Bench Irrigation District
1100 HWY 41
Dillon, MT 58725

Dear Mr. Miotke:

The DNRC recognizes the difficult water distribution issues facing water users in the Beaverhead River Basin. And because our agency is charged generally with coordinating the development and use of water within the State, we feel compelled to help you in better managing the resource. However, we must proceed with caution when issues involve water distribution between competing water users that is under the jurisdiction of the District Court. For instance, it would not be proper for the DNRC, as a public agency, to assert legal opinion or provide expert analysis that could be perceived as favoring one side over another. Under these constraints, we will attempt to respond to your questions and to offer our assistance where we can.

It will ultimately be up to the court to determine whether a method for distributing water by priority is proper. From an impartial, technical standpoint, the DNRC could review the current procedures and offer comments and suggestions for improvement if asked to do so by the District Court. In the end, however, any allocation procedure will have to be approved by the Court. The DNRC is not in a position to prejudge whether or not the Court would deem your allocation procedure as appropriate.

As you know, the U.S. Bureau of Reclamation is funding research for the purpose of better understanding the hydrology of the Beaverhead River basin. The DNRC intends to assist the Bureau of Reclamation with this effort. The information acquired through this research might be useful in improving water management in the basin. We look forward to assisting you in understanding this information and in applying it to basin water management plans where appropriate.

Your second question concerns the DNRC's authority over the expanded acres of irrigation. The DNRC's view is that new irrigation requires a water right. Such a water right is usually obtained by applying to the DNRC for a new use permit under Mont. Code Ann. § 85-2-311 or applying to the DNRC for authorization to change the place of

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STATE WATER PROJECTS
BUREAU

RECEIVED TIME

WATER MANAGEMENT
BUREAU

NOV. 21, 2006 2:33PM

WATER OPERATIONS
BUREAU

PRINT TIME NOV. 21,

WATER RIGHTS
BUREAU

2:34PM 444-6610

Page Two
February 8, 2005

use of an existing water right under Mont. Code Ann. § 85-2-402. It would not be possible at this time to obtain a permit for a new irrigation water use with surface water, because the upper portions of the Missouri River basin are closed to these new appropriations (§85-2-341). A change of use authorization is a requirement for use of salvaged water, see Mont. Code Ann. § 85-2-419, just as such authorization is required where one plot of land is taken out of irrigation and the water applied to a new plot.

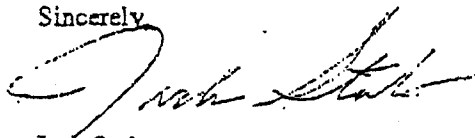
The underlying storage right held by the Bureau of Reclamation (BOR), a Federal agency, is a state based water right and is subject to the same place of use limitations as any other state based water right except in one possible respect. It may be the case for the stored water that the BOR claimed a "general service area" for the place of use. If so, stored water might be applied to new irrigation without obtaining a change authorization as long as the new area were within the general service area claimed for the Project, and as long as the quantity of stored water used is not increased. Usually, if additional land is irrigated, more water is used.

Your letter indicates that the signers entered into an agreement with the BOR under which existing decreed rights were commingled with the storage right. This fact presents several legal issues that may need to be sorted out between the BOR, the signers, and the Water Court. If such an agreement were entered now, a change authorization would probably be required. However, if the arrangement were made before the effective date of the Water Use Act (1973), it would be beyond the DNRC's purview.

The last concern expressed in your letter is adjudication priority for the Beaverhead basin. You should refer to Mont. Code Ann. 85-2-218 in this regard. You may wish to talk with your local legislators or initiate a petition to the court to prioritize an adjudication of your water rights claims.

The DNRC applauds your efforts to get matters moving early. We are here to assist you with your efforts, so that the Court will be equipped with the best available information to properly manage water in the Beaverhead basin.

Sincerely



Jack Smits
Administrator
Water Resources Division

cc: Rich Moy
Fred Robinson
Lenny Duberstein

EGU-229-A

EDMBL 4

DATE 3/26/09

SS 407



IN REPLY
REFER TO:
MT-740
WTR-4.03

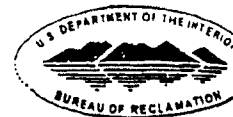
United States Department of the Interior
BUREAU OF RECLAMATION

Great Plains Region

Montana Area Office

P.O. Box 30137

Billings, Montana 59107-0137



JANUARY 16 2003

Mr. Dennis Miotke, Manager
East Bench Irrigation District
1100 Hwy 41
Dillon, MT 59725

Subject: Transferring Valley Water to Bench Lands

Dear Dennis:

Thank you for your letter dated December 20, 2002, requesting a set of guidelines from the Bureau of Reclamation for transferring water between valley lands and bench lands. It is our understanding that you are asking about temporary, one-year water transfers and that this situation is the result of the prolonged water shortage in the Beaverhead River Basin.

We have reviewed both the Clark Canyon Water Supply Company (Company) contract and the East Bench Irrigation District (East Bench) contract. Concerning the Company contract, Section number 3, Furnishing and Regulation of Water, provides "...4 acre-feet of water for each acre of land now irrigated by the shareholders...". It is our interpretation that water under this contract can only be applied to lands which were irrigated at the time the contract was executed (1958). Reclamation did an extensive investigation at that time to identify the lands irrigated. The result of that investigation fixed the lands irrigated by the Company to a specific 28,004 acres. Further, the lands are to receive only the amount of water the crops can beneficially use.

In the case of the East Bench contract, the arable acreage approved by Reclamation is the only acreage eligible for contract water. Lands irrigated with Reclamation water must be classified as irrigable according to Reclamation standards. The requirement for land classification on Reclamation projects was first addressed with passage of the 1924 Fact Finders Act. Subsequent laws that also address land classification include the Omnibus Adjustment Act (May 25, 1926), the Reclamation Project Act of 1939, the Interior Department Appropriation Act of 1954 (July 31, 1953), and the Garrison Diversion Unit Reformulation Act of 1986. Land classification is required for all lands within Reclamation projects to be served with water for irrigation.

There are two obvious circumstances under which water users may want to transfer valley water to bench lands. Following are two examples with our recommendations:

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1902-2002

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1. A shareholder of the Company can irrigate their valley lands in the Company with less than 4 acre-feet per acre and wishes to transfer the unused water allotment to other lands.

Recommendation: Our position is the valley lands have received the full benefit as provided under the Company contract, regardless of the amount of water actually used. The unused allotment is not a property right held by the shareholder that can be transferred to other lands. Reclamation is not in a position to approve this type of water transfer.

2. A shareholder of the Company plans to not irrigate their valley lands in the Company and wishes to transfer the entire water allotment to other lands.

Recommendation: This type of water transfer can be considered but would require approval by Reclamation on a case-by-case basis. A formal agreement between East Bench, the Company, and Reclamation would be required for an efficient approval process and to define how the water transfer would work.

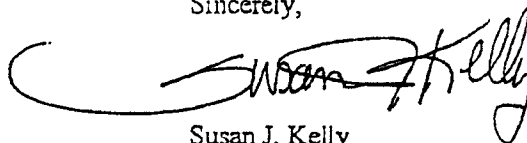
A water transfer between valley lands and bench lands, even on a temporary basis, would require compliance with Montana water law. An application for change in a water right would need to be filed with the Montana Department of Natural Resources and Conservation (MDNRC). These requirements are provided in Montana Code Annotated 85-2-402 and 85-2-407. Based on recent discussions with MDNRC staff, if such an application for change was submitted today, the application probably could not be processed prior to the end of the 2003 irrigation season.

To summarize, it is our position that any transfer of water between valley and bench land needs the approval of Reclamation and must comply with Montana water law. The constraint of having to meet Montana water law requirements prior to implementing such a transfer supports the position that no such water transfers should occur during the 2003 irrigation season. We recognize that water supply conditions are highly uncertain, and we are willing to work with you to develop and implement a process that will help facilitate reasonable water transfers. However, it must be realized that such efforts will not alleviate the immediate needs posed by current water supply conditions.

As confirmed by your letter of January 15, 2003, members of my staff are available to meet with you in Dillon on January 28, 2003.

Please contact Scott Guenthner at 247-7319 if you have any further questions on this subject.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan J. Kelly", with a large, sweeping flourish extending from the left side.

Susan J. Kelly
Area Manager



IN REPLY
REFER TO:

United States Department of the Interior
BUREAU OF RECLAMATION

Great Plains Region
Montana Area Office
P.O. Box 30137
Billings, Montana 59107-0137



MT-740
WTR 4.03

FEBRUARY 4 2003

Mr. Dennis Miotke, Manager
Clark Canyon Water Supply Company
1100 Highway 41
Dillon, MT 59725

Mr. Dennis Miotke, Manager
East Bench Irrigation District
1100 Hwy 41
Dillon, MT 59725

Subject: Transferring Valley Water to Bench Lands

Dear Dennis:

We appreciated the opportunity of attending your joint meeting on Tuesday, January 28, 2003, and discussing a variety of contractual issues including the potential transfer of water between valley lands and bench lands in the Beaverhead River Basin. Based on discussions at the meeting, some water users are making plans to transfer water between valley and bench lands in anticipation of water shortages this year.

We want to reaffirm the Bureau of Reclamation's position on such water transfers as we stated at the meeting. Of particular concern to Reclamation is the transfer of water from lands of Clark Canyon Water Supply Company shareholders to lands of East Bench Irrigation District, and vice versa. The lands of Clark Canyon Water Supply Company shareholders, and all lands served by East Bench Irrigation District, receive federal water from Clark Canyon Reservoir. Any water transfer between these lands should be approved by both Boards prior to submitting the proposal to Reclamation for formal consideration.

It is our interpretation that water delivered under either the Clark Canyon Water Supply Company contract, or the East Bench Irrigation District contract, can only be applied to lands duly authorized by Reclamation. For the Clark Canyon Water Supply Company, the lands authorized to receive Reclamation water are the specific 28,004 acres of land which were irrigated at the time the contract was executed in 1958. For the East Bench Irrigation District, the lands authorized to receive Reclamation water are the specific acreages approved by

A Century of Water for the West
1902-2002


EXHIBIT H

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Reclamation through the land classification process. Any deviation from the authorized water deliveries outlined above is a violation of Reclamation law.

If you have any further questions on this matter, please contact Scott Quenthner at 247-7319.

Sincerely,


Susan L. Kelly
Area Manager

cc: Office of the Solicitor
Billings Field Office
Pacific Northwest Region
Attn: John Chaslin
316 N 26th Street, Room 3005
Billings, MT 59101



IN REPLY
REFER TO:

United States Department of the Interior
BUREAU OF RECLAMATION
Great Plains Region
Montana Area Office
P.O. Box 30137
Billings, Montana 59101-0137



SEP 3 2004

MT-750
WTR-4.03

Dennis Miotke, Manager
East Bench Irrigation District
1100 Highway 41
Dillon, MT 59725

Subject: Response to August 9, 2004 Letter of Request for Information Related to Clark Canyon
Water Supply - Water Supply Contract No. 14-06-600-3592

Dear Mr. Miotke:

This letter is in response to your request for information in relation to several items of the existing contract with the Clark Canyon Water Supply Company (Company) for water service and for a supplemental supply.

You requested our interpretation of Section 3.1 on page 5 of the contract. The section reads:

(1) First Priority: 4 acre-feet of water for each acre of land now irrigated by shareholders of the Company and for such additional acres with valid water rights on the date of the execution of this contract as may be owned by persons now or hereafter shareholders of the Company, to be measured at the River headgates to which it is distributed.

Reclamation provided an interpretation of Section 3.1 in a January 16, 2003 letter to the East Bench Irrigation District (District) and in a February 4, 2003 letter to both the Company and the District. While the main subject of the letters was the transfer of water from the valley to the bench, the letters also provided our interpretation of this section, common to both the Company and the District's water service contracts. The February 4, 2003 letter stated that "water delivered under either the Clark Canyon Water Supply Contract, or the East Bench Irrigation District Contract, can only be applied to lands duly authorized by Reclamation. For the Clark Canyon Water Supply Company, the lands authorized by Reclamation are the specific 28,004 acres of land which were irrigated at the time the contract was executed in 1958."

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Reclamation's present understanding is that the Company is authorized to provide irrigation water for 28,004 acres to subscribers of stock in the Company, as referenced in the Definite Plan Report on East Bench Unit, Three Forks Division, Missouri River Basin, April 1960. Of the 28,004 acres, 24,848 acres were identified as needing a supplemental supply to reach the 4 ac-ft per acre, and 3,156 acres were identified as having senior water rights and have no supplemental requirement to reach 4 ac-ft per acre. It is our understanding that the 24,848 acres were issued class B & C stock and the 3,156 acres were issued Class A stock in the Company.

The 4 ac-ft per acre of water, measured at the point of diversion from the river, is the first priority water and is to be applied to the 28,004 acres of the Company. This does not, however, preclude additional water being delivered to those lands under Section 3.3 as a third priority under the contract. However, the lands identified in Section 3.3 are to receive only the amount of water the crops can beneficially use.

It is also Reclamation's understanding that the original intent of both Reclamation and the Company was to fix the number of acres served by the Company in the contract. This limitation on the use of water under existing water rights was a prerequisite for proper sizing and development of the East Bench Unit. This understanding is derived from a collective reading of Section 3.1 of the contract, the supporting documents referencing irrigated acres, and the subscription agreement.

Reclamation arrived at this interpretation of Section 3.1 of the Company's contract from a review of several documents. We recognize that the Company may have a differing view and we are willing to work with both the Company and the District to come to a common understanding of Section 3.1.

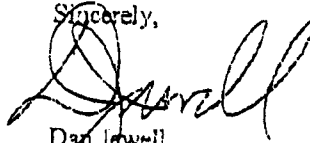
As requested, a blank copy of the subscription agreement between the Company and individuals within the Company is enclosed. The executed copies of the subscription agreements should be available from the Company. You may also be able to locate an official copy at the local courthouse. Note that the blank copy of the subscription agreement is between the individuals and the Company. Reclamation entered into a contract with the Company and not individual farmers.

We are unable to respond to the request for an opinion on the amended water rights concerning allowance for expanded acres at this time. We suggest that the appropriate parties be assembled to discuss this issue in detail to get a better understanding of this issue. The appropriate parties should include Reclamation, the District, the Company, and the Montana DNRC, with appropriate legal counsel present.

Reclamation understands the concern of the District related to water availability. The existing contracts anticipated the need for administration of the conservation storage in Clark Canyon Reservoir as referred to in Article 6.b of the Company's contract and 6.b of the East Bench Contract (Contract No. 14-06-600-3592). We suggest that you request the board, referred to in Article 6.b, be convened to discuss the administration of the conservation storage with the Company. Reclamation would serve as the Secretary's representative on the board.

Please feel free to contact Brent Esplin at 406-247-7489 if you have any additional questions regarding these subjects.

Sincerely,



Handwritten signature of Dan Jewell in cursive script.

Dan Jewell
Area Manager

Enclosure